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No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARY JANE HOLLYDAY,

Petitioner,

v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, IN HIS OFFICIAL AND IN HIS PERSONAL CAPACITIES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of legislative immunity bars suit for constitutional torts against purely local legislators?

2. Whether the doctrine of legislative immunity, if it applies to purely local legislatures, bars suit for constitutional torts against local governmental entities based on actions of its legislators?

3. Whether the doctrine of legislative immunity, if it applies to purely local legislatures, bars suit for constitutional torts against local government officials who are not legislators but who are executing actions of local legislatures?

4. Whether the action of county commissioners in abolishing positions for

political retribution against an individual holding the position or applying for it with preferential rights under the county's personnel plan is a "legislative" act which would implicate the doctrine of legislative immunity, if it applies to purely local legislatures?

5. Whether the doctrine of legislative immunity applies to bar relief other than damages or criminal prosecution against the legislators?

6. Whether allegations that county commissioners abolished a position in county government to which an individual was entitled under the county's personnel plan in political retribution against that individual states a cause of action under 42 U.S.C. § 1983?

7. Whether the abolition of a position by county commissioners for

political retribution against an individual holding a position or applying for it with preferential rights under the county's personnel plan constitutes a bill of attainder in violation of Article I, § 9 of the United States Constitution?

PARTIES TO THE PROCEEDING

Plaintiff

Mary Jane Hollyday

Defendants

Gene E. Rainey, Chairman of the Buncombe County Commissioners, in his official and personal capacities; Doris P. Giezentanner, in her official and personal capacities; Jesse I. Ledbetter, in his official capacity; C. T. Sobol, in his official and personal capacities; William H. Stanley, in his official and personal capacities; Michael A. Kirstein, in his official and personal capacities; Robert Thornberry, Jr., in his official and personal capacities; Buncombe County, a North Carolina County

Third-Party Defendant

Robert Curtis Ratcliff

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GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, IN HIS OFFICIAL AND IN HIS PERSONAL CAPACITIES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Mary Jane Hollyday respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 26, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 964 F.2d 1441, and is reprinted in the appendix hereto, p. 1a, infra.

The decision of the United States District Court for the Western District of North Carolina (Voorhees, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 40a, infra. The memorandum and recommendation of the magistrate which was accepted by the District Court is also reprinted in the appendix hereto, p. 48a, infra.

SUPREME COURT JURISDICTION

The petitioner brought this suit under

42 U.S. Code § 1983 in the Western District of North Carolina. On March 14, 1991, the Western District granted respondents' motions for summary judgment and for failure to state a claim upon which relief can be granted (as to the § 1985 action. The petitioner's failure to rehire action was dismissed ex mero motu as failing to state a claim upon which relief can be granted. The summary judgment was allowed on the basis of the doctrine of legislative immunity and as to one defendant on the basis of qualified immunity. See p. 40a, infra.

On petitioner's appeal, the Fourth Circuit on May 26, 1992, entered a judgment and an opinion affirming the District Court. See p. 1a, infra. The petitioner's petition for rehearing with suggestion for rehearing in banc was denied by the Fourth Circuit on July 7, 1992. See p. 78a, infra.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment XIV. § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Article I. § 9. [3.]: No bill of attainder or ex post facto law shall be passed.

STATUTE INVOLVED

42 United States Code § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner was a prominent Republican [1] who was hired by Buncombe County to be the Office Manager for the Reappraisal Project which is part of the Tax Assessor's office. At the time she was employed in 1987, there was a Republican majority on the board of county commissioners; and she

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[1] The complaint alleges that she had been a Vice Chairman of the Buncombe County Republican Party, Republican candidate for the North Carolina Senate from the 26th District, Vice Chairman of the North Carolina Republican Party, a delegate to the 1976 Republican National Convention, an Alternate Delegate to the 1980 Republican National Convention, a delegate to the 1984 Republican National Convention, and a statewide cochairman of the campaign of the late Republican United States Senator John East. She also had served as staff director for Senator East until his death.

was a close personal friend and political associate of the chairman of the commissioners. Her supervisors considered her performance in this position as excellent.

In a general election held in November, 1988, the Republican chairman of the board of county commissioners was defeated by a Democrat and the majority on the board shifted from Republican to Democrat. After the election but before the new commissioners took office, the county attorney[2] told another county employee who was also a friend and political ally of the outgoing chairman that since it was apparent that it was the intention of the new administration to

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[2] He was appointed county attorney by the Republican controlled board but was retained for a brief period by the new Democrat controlled board and continues to be an assistant County Attorney. The new county attorney was previously chairman of the county Democrat party.

sever that employee's employment with the county that he would advise the commissioners to abolish the position. The county attorney told that employee that another option would be to amend the county's personnel plan to make his position exempt and then to fire him. Faced with such a dilemma, that employee resigned.

The new board was sworn in on December 5, 1988, and held an organizational meeting following the ceremony. On December 16, 1988, the board met in "continued session". The first order of business at that meeting was to go into executive session. The Tax Assessor was called into the executive session. The new chairman's campaign manager read a resolution to abolish petitioner's position. The Tax Assessor informed the board of the high quality of petitioner's

work and requested that they not abolish her position. This was the first inquiry anybody had made of him concerning either her duties or the quality of her work. He was ultimately responsible for the reappraisal. He acknowledged to the board that petitioner carried "political baggage" but told them that her performance was good and that petitioner had never used politics in her job. After the board voted on that day to abolish petitioner's position, the Tax Assessor was directed to formulate recommendations for the carrying out of petitioner's functions. The project manager of the reappraisal unit (petitioner's immediate supervisor) was informed of the abolition of the position after the fact. Nobody had consulted with him prior thereto concerning either petitioner's performance or her duties or how those duties might otherwise be carried out.

In the early part of January, 1989, the new chairman and his former campaign manager who had been appointed "Transition Manager"[3] came to the reappraisal office for a meeting with the employees of the reappraisal unit. At the meeting the new chairman said, "Everybody that is left in the reappraisal office is considered professionals--not political."[4] He assured them that they would remain employed to the end of the reappraisal project.

Additionally, there had been a budgeted position for an Assistant Tax Assessor since before February, 1987. It had not been filled because the Tax Assessor did not want an assistant. On December 8, 1988, the County Personnel

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[3] Michael A. Kirstein, respondent.

[4] Petitioner's position was the only position in the reappraisal office that was abolished.

Director[5] advertised for the filling of this position without discussing it with the Tax Assessor on the direction of the new chairman. Four applications for the position were submitted to the Tax Assessor by the personnel office for his selection. Petitioner's application was among the four. The Tax Assessor told the "Transition Manager" that petitioner was qualified for the position and according to the personnel plan should be given preferential treatment.[6] In fact the Tax Assessor told the "Transition Manager" that he would refuse to sign a personnel action form filling the position unless petitioner was the one being hired. The

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[5] Robert Thornberry, Jr., respondent.

[6] The personnel plan provided that any employee who had been the subject of a reduction in force would be accorded first priority for reemployment by the county. Petitioner alleges that this constituted a part of her contract of employment with the county.

Tax Assessor told him that if they chose someone other than petitioner they would open up a lawsuit. The Tax Assessor told the "Transition Manager" that he knew who they wanted, and the "Transition Manager" did not deny it. the "Transition Manager" talked to the county attorney about petitioner's application for the position. Thereafter, the "Transition Manager" told the Tax Assessor that the position of Assistant Tax Assessor had been abolished by the board of county commissioners.

In March of 1989, petitioner's counsel requested the county attorney to seek her reinstatement. On April 6, 1989, petitioner's counsel sent a letter to the county attorney stating that suit would be filed in the United States District Court if the county rejected petitioner's claim. The county attorney contacted petitioner's counsel in late April, 1989, stating that

the commissioners refused to either reinstate her or pay her any damages. Consequently, in 1989 petitioner instituted this action seeking permanent injunctive relief requiring her reinstatement in her employment with Buncombe County, monetary damages, and a declaratory judgment. The action was grounded upon petitioner's contention that the abolition of the position which she held and the subsequent abolition of the position to which she would have been entitled were motivated by a desire to retaliate against her due to her political beliefs, affiliation, and associations in violation of the First Amendment. It was also grounded on her contention that she was given no pretermination hearing in violation of the due process clause of the Fourteenth Amendment. The action was filed pursuant to 42 United States Code §

1983.[7]

The defendants in the lawsuit filed a motion for summary judgment on April 13, 1990. The motion was grounded on the doctrine of legislative immunity as to all defendants and the doctrine of qualified immunity as to the director of personnel. The magistrate in his memorandum and recommendation recommended the granting of the motion on both grounds and the District Court granted summary judgment as to all the defendants based on legislative

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[7] The District Court had jurisdiction of the causes of action pursuant to 28 United States Codes § 1331, 28 United States Codes § 1343, and 42 United States Code § 1983 and the doctrine of pendent jurisdiction (as to the state law claim). The trial court ex mero motu dismissed the petitioner's claim based on the failure to hire her for the position of assistant tax assessor pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The respondents' 12(b)(6) motion had been directed only at the 42 United States Code § 1985 claim. Petitioner does not here challenge dismissal of the portion of the lawsuit founded on 42 United States Code § 1985.

immunity both as to the § 1983 claims and as to the pendent jurisdiction claim of intentional infliction of emotional distress. The magistrate recommended and the district court concurred in granting summary judgment to the director of personnel on the basis of qualified immunity as well. Also, the District Court on the recommendation of the magistrate dismissed the pendent jurisdiction claim for breach of contract, but such dismissal was without prejudice.

From these rulings the petitioner gave notice of appeal to the Fourth Circuit Court of Appeals.[8] The Fourth Circuit in a published opinion affirmed the district court's judgment. Judge Hall wrote the opinion of the court. Judge Luttig wrote

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[8] The Court of Appeals had jurisdiction of this appeal pursuant to 28 United States Code § 1291.

an opinion concurring in part and concurring in the judgment. Senior Judge Butzner wrote a dissenting opinion.

Judge Hall's decision was denominated in four parts. Part I briefly recited some of the facts. Part II concluded that the doctrine of legislative immunity was a complete defense to petitioner's 1983 free speech/association claims and state law claim for intentional infliction of emotional distress. In reaching this decision Judge Hall relied on two recently decided Fourth Circuit decisions, to wit: Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988) and Baker v. Mayor and City Council of Baltimore, 894 F.2d 679, cert. denied, 111 S.Ct. 56 (1990). Judge Hall reasoned in this part that not only the individual legislators would be immunized but the governmental entity would be immunized as well. He did not

discuss the basis of affirming the dismissal as to the defendants who were not legislators. In a footnote Judge Hall noted that since the affirmance was on the grounds of legislative immunity there was no need to reach the issue of the qualified immunity of the county personnel officer. In Part III Judge Hall affirmed the District Court's dismissal of petitioner's § 1983 claim relating to the failure to hire her for the assistant tax assessor position for failure to state a claim upon which relief can be granted. In Part IV Judge Hall affirms the District Court's decision to decline to exercise pendent jurisdiction over the remaining state claims. Judge Hall in conclusion approvingly cited the magistrate's memorandum and recommendation which had been adopted by the district court.

Judge Luttig, concurring in the

judgment, concurred with Judge Hall in regard to Parts I, III, and IV of his opinion. While agreeing with the judgment in regard to Part II (granting of summary judgment), Judge Luttig did not join Judge Hall in Part II of Judge Hall's opinion. Instead, he reasoned that the defendants were entitled to summary judgment on petitioner's First Amendment claim on another basis. Judge Luttig wrote:

> Rather than hold, as Judge Hall would, that Baker and Schlitz extend to constitutional claims against a municipality under § 1983, and thus that the doctrine of legislative immunity insulates from inquiry discussions that occur before an official even becomes a legislator, I would decide this case on the narrow ground that Hollyday simply has failed to meet her burden under Fed.R.Civ.P. 56 to present a question of material fact as to an essential element of her claim.

See 18a, infra.

Judge Luttig reasoned that petitioner failed to present evidence of actions of the commissioners after they became

officers of the county.[9] Judge Luttig in refusing to adopt the opinion contained in Part II of Judge Hall's opinion wrote that:

> In my view, extension of Baker and Schlitz to the constitutional claim advance by Hollyday in this case would be, at the very least, in substantial tension with, if not foreclosed by, the Supreme Court's decision in Owen v. City of Independence, 445 U.S. 622 (1980), a decision not cited or discussed in either Baker or Schlitz. See also Monell vs. Department of Social Servs., 436 U.S. 658, 701 (1978)(holding that "municipal bodies sued under § 1983" for constitutional violations" cannot be entitled to...absolute immunity"). In Owen the Court held that a municipality is not entitled to qualified immunity under section 1983 based upon the good faith of its officers or agents.
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> It concluded that Congress could not have intended either the

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[9] There was abundant evidence of conversations and actions taken after the newly elected commissioners were sworn in that was contained in the record on the question of summary judgment. However, it would not appear to be necessary to recount this evidence at this point.

> common law municipal immunity for "governmental" (as distinguished from proprietary activities or the immunity for "discretionary" or "legislative" (as distinguished from ministerial) to limit municipal liability under section 1983. See id. at 644-50.
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> ***
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> The reasoning of the Court in Owen would appear to apply with equal force to a claim of absolute municipal immunity based upon the testimonial privilege of a municipality's officers and agents. There is no evidence that such an absolute immunity existed at common law. (Even if there were, presumably this court could not recognize it given the Supreme Court's holding in Monell that there is no absolute municipal immunity under section 1983.) And the "governmental" and "legislative" municipal immunities discussed in Owen that were recognized at common law could not serve as foundations for recognition of such an absolute immunity, for the same reasons that they could not support the qualified immunity at issue in Owen. Accordingly, I cannot join part II of Judge Hall's opinion.

pp. 12a - 17a, infra.

Senior Judge Butzner, dissenting, contends that the defense of legislative immunity is not a bar to petitioner's cause of action as based on the First and

Fourteenth Amendments. Judge Butzner found that while the doctrine of legislative immunity might immunize the county commissioners from personal liability and from testifying, it would not bar a cause of action against the county or its officers performing executive functions. Nor would the doctrine preclude testimony from persons who later became commissioners about events occurring prior to their taking office. Judge Butzner wrote:

> It is unnecessary for the purpose of this dissent to recount the evidence and the reasonable inferences that can be drawn from the evidence on which Ms Hollyday relies. It is sufficient to note that a genuine issue of material fact exists concerning her claim of a constitutional tort and the county's claim that efficiency and economy dictated the elimination of the two positions.

p. 27a, infra.

Judge Butzner noted that the constitutional predicate for petitioner's

cause of action is derived from Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445 U.S. 507 (1980) and Rutan v. Republican Party, 110 S.Ct. 2729 (1990) and said that elimination of a job for purposes of political discrimination is the same as a discharge. Judge Butzner would not apply the defense of legislative immunity to the governmental entity. He suggests that Schlitz and Baker are age discrimination cases and should not be applicable to a local government's violation of the United States Constitution. The legislative immunity conferred upon the county's director of personnel and on the transition manager is, in Judge Butzner's opinion, too broad. He would find that the director of personnel would have no legislative immunity other than immunity from testifying about the commissioner's statements in executive meetings of the

board, commissioners' motives, and communications of a legislative nature that he had with the commission. He notes several items of evidence that would not be immunized by this doctrine.

Petitioner filed in the Fourth Circuit a petition for rehearing and suggestion for rehearing in banc. While the Court of Appeals directed the respondents to file a response to said petition, it was ultimately denied with Judge Butzner again dissenting. The denial of the petition was filed on July 7, 1992.

REASONS FOR GRANTING THE WRIT

I

The Fourth Circuit's determination that the legislative immunity doctrine is applicable to purely local legislatures is an important question of federal law which has not been, but should be, settled by this Court.

The Fourth Circuit has decided that the doctrine of legislative immunity is applicable to purely local legislative bodies. The doctrine of legislative immunity which is grounded in the Speech and Debate Clause was extended by this Court to state legislators in Tenney v. Brandhove, 341 U.S. 367 (1951) and extended to regional legislators in Lake Country Esates, Inc. v. Tahoe Regional

Planning Agency, 440 U.S. 391 (1979). While most circuits including the Fourth Circuit have extended the doctrine to purely local legislators, this Court in Lake Country specifically noted in footnote 26 that this issue was not presented and therefore not decided. In fact, as Justice Brennan notes in his dissenting opinion in Spallone v. United States, 493 U.S. ___, 107 L.Ed. 2d 644, 669 (1990), this Court reached its decision "(w)ithout holding today that the doctrine of absolute legislative immunity itself is applicable to local (as opposed to state and regional) legislative bodies..." The uncertainty of the law on this point is reflected in Judge Butzner's dissent; however, "for purpose of this appeal, I assume that county commissioners are entitled to legislative immunity..." p. 33a, infra.

II

The Fourth Circuit's determination that the doctrine of legislative immunity bars suit for constitutional torts against local governmental officials who are not legislators but who execute decisions of local legislatures is in conflict with decisions of this Court.

The Supreme Court in the case of Powell v. McCormack, 395 U.S. 486 was confronted with and directly addressed the issue of whether defendants who are merely employees of the legislative branch may plead the doctrine of legislative immunity. Factually, Powell arose when the United States House of Representatives voted to exclude New York Congressman Adam Clayton Powell from his seat in the House of Representatives. Powell sued not only

certain members of Congress but also the Sergeant at Arms of the U. S. House of Representatives.

In deciding the issue the Court relied on two earlier decisions. In the case of Dombrowski v. Eastland, 387 U.S. 82 (1967), damages were sought against a U.S. Senator and the chief counsel to a subcommittee which the Senator chaired. This Court affirmed the granting of summary judgment in favor of the Senator but reversed the granting of summary judgment in favor of the subcommittee counsel. This holding was in conformity with Kilbourn v. Thompson, 103 U.S. 168 (1881). Kilbourn permitted a suit for false imprisonment against the Sergeant at Arms of the U.S. House of Representatives for executing an arrest warrant which was based on an unconstitutional contempt resolution passed by the House. Thus, the

presence of a Sergeant at Arms as a defendant in Kilbourn and a subcommittee counsel as a defendant in Dombrowski allowed judicial review of congressional action in both cases. Powell's action against the Sergeant at Arms of the House of Representatives to compel payment of his salary allowed the judiciary to look into the actions of the U.S. House of Representatives notwithstanding the Speech or Debate Clause of the Constitution. Powell held: "That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." Pages 504-505. Therefore, in Powell, as in Kilbourn and Dombrowski, even though the action against the legislators may be dismissed, plaintiff was permitted to maintain his action against the legislative employees and thus obtain judicial review of the

legislative action. Powell concluded its analysis by quoting approvingly from Kilbourn, "in language which time has not dimmed":

> "Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the power of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. 103 U.S. at 199, 26 L Ed. at 390."
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> Powell, page 506

The allegations that the position of

assistant tax assessor was abolished by the commissioners in political retribution against petitioner inasmuch as she would have been entitled to that position under the personnel plan states a cause of action, and the Fourth Circuit's affirmation of the trial court's ex mero motu dismissal under Rule 12(b)(6) was improper.

III

The issue of whether the abolition of a position for purposes of political retribution is a "legislative" act which would implicate the doctrine of legislative immunity and whether the doctrine applies to bar relief other than damages or criminal prosecution against the legislators are important questions of federal law which have not been, but should be,

settled by this Court. The Fourth Circuit's view that political retribution can be shielded as a "legislative" act is in conflict with the decision of this Court and is in conflict with a decision of another United States Court of Appeals.

Due to the decision to permit the case to go forward against the employee, the Court noted in Powell that there were other issues raised which it did not address: first, whether the legislators in voting to exclude Powell were "acting in the sphere of legitimate legislative activity" that the Court sought to protect in Tenney v. Brandhove, 341 U. S. 367, 476; and secondly, whether the bar of legislative immunity applies to bar relief other than damages or criminal prosecution against the legislators.

The first unanswered question in Powell concerning whether legislative immunity protects legislators acting outside of "legitimate" legislative activity needs to be addressed by this Court in this appeal. The respondents (except Ledbetter) targeted friends and political associates of the defeated chairman for removal from their employment and used the guise of abolishing positions to accomplish this. When the threat of abolishing the position brought about the desired resignation, the position was not abolished. This occurred in regard to certain positions. Plaintiff's position was terminated solely because plaintiff was a prominent Republican with close personal and political ties to the former chairman. Beginning with Elrod v. Burns, 427 U. S. 347 (1976) and Branti v. Finkel, 445 U. S. 507 (1980) the law has clearly been established that the First Amendment

prohibits the discharge or threatened discharge of public employees for not being supporters of the party in power unless party affiliation is an appropriate requirement for the position. Rutan v. Republican Party of Illinois, 497 U. S. ____, 111 L. Ed. 2d 52, 110 S Ct. 2729 (1990). Rutan decided on June 21, 1990 (two months before the Memorandum and Recommendation) reaffirmed and significantly expanded this protection to prevent promotions, transfers, and recalls after layoffs from being based on political affiliation or support. The county attorney, knowing this constituted a barrier to the desires of the Democratic majority on the new board, looked to other means outside of "firing" to accomplish their goal of purging political supporters of the former chairman from the County's payroll. As they were taking the action against petitioner, both in abolishing her

job and in abolishing another job that she was qualified for and entitled to, these commissioners were attempting to produce a result that they could not do directly. "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." Rutan.

In a recent case, the First Circuit discussed the fact that the doctrine of legislative immunity extends only to legislative acts rather than to administrative acts. Acevado-Cordero v. Cordero-Santiego, 958 F2d 20,23 (6th Cir. 1992). In that case the popular Democratic party gained control of the city government winning the mayor's post and a majority of the legislative body. The rival party had controlled the city for the previous twelve years. The new administration determined the city was in

a financial crisis. The new mayor proposed the elimination of about 600 jobs from the city's civil service. This was accomplished by an act of the legislative body. Attached to the legislative act was a listing of the positions eliminated by title. The list contained not only the description of each eliminated position but also the number which identified a specific position and consequently identified particular employees. The plaintiffs contended that the adoption of the ordinance was a device to eliminate adherents to the ousted party from the civil service and to replace them with members of the new ruling party. The defendants raised the issue of legislative immunity by motion for summary judgment. The district court denied the motion and the First Circuit affirmed that denial on March 6, 1992. The appellees contended that "the neutral appearance of the

ordinance is a ruse". (Page 23). The appellants denied that the ordinance was politically motivated. The Court of Appeals ruled that the motion for summary judgment should be denied because "this area of disputed fact remains a genuine issue of material fact to be determined by trial". Hughes v. Tarrant County, Tex, 948 F.2d 918, 921 (5th Cir. 1991).

The second question raised but unanswered in Powell was whether the bar of legislative immunity applies to bar relief other than damages or criminal prosecution against the legislators. This, too, needs to be addressed by this Court in this appeal. Other relief has been sought including declaratory judgment and an injunction. Powell as noted above suggests that the trial court could grant declaratory relief which could form the basis for an injunction. Similarly, the Fifth Circuit decided a case August 1,

1991, concerning immunity of local legislators in a 1983 lawsuit. While holding them to be entitled to legislative immunity against damages in their individual capacities, the claims for injunctive and declaratory relief against them in their official capacities were allowed to proceed. Calhoun v. St. Bernard Parish, 937 F. 2d 172 (5th Cir. 1991). Interestingly, the Fifth Circuit in an even more recent case (decided November 29, 1991) sought to differentiate between legislative acts entitled to absolute immunity and other actions by legislative bodies entitled only to qualified immunity. Hughes . Hughes dealt with the refusal of the county commissioners to pay the legal fees of the clerk of court incurred by him to defend a contempt citation grounded on his actions in his official capacity as clerk

of court. The county commissioners, on advice of the district attorney, refused to pay for the fees. The clerk of court brought suit under 1983 alleging deprivation of equal protection of the law and conspiracy to deny his constitutional rights. The county commissioners sought summary judgment based on absolute legislative immunity contending that the allocation and expenditure of county funds was a matter of their official duties while acting as county commissioners. The district court denied their motion, and the Fifth Circuit affirmed holding that the conduct by the commissioners was not legislative. "If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative.

Even in its enunciation of the doctrine of legislative immunity, the

Supreme Court recognized that the doctrine has no application whatsoever where the wrong committed by the municipality or other "person" amounts to a deprivation of a constitutional right. Legislative immunity protects officials from liability only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlowe v. Fitzgerald, 457 U.S. 800, 818 (1982). This considerable limit on the application of the doctrine of legislative immunity conforms to the policy established over time. Courts recognize the necessity of zealously guarding the First Amendment freedoms of association and of expression because of the fundamental role they play in preserving a free society. "A state cannot deny any benefit to a person on a basis that infringes his constitutionally protected

interests - especially his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1972).

While not raised by the petitioner either before the trial court or the Fourth Circuit, this Court should decide whether the actions taken by respondents constitute a bill of attainder in violation of Article I, Section 9 of the United States Constitution. Petitioner cites no case on this point but considers this a substantial inquiry.

IV

The holding of the Fourth Circuit that legislative immunity bars suit for constitutional torts against local governmental entities based on actions of its legislators is in conflict with decisions of this Court and with

decisions of other United States Courts of Appeals.

The ability to seek damages against the governmental entity even if prevented by immunity from suing the individual legislators is the prevailing law. This was essentially conceded in Judge Luttig's concurring opinion. See: Pembaur v. Cincinnati, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978); Minton v. St. Bernard Parish School Bd., 803 F. 2d 129 (5th Cir. 1986); Healy v. Town of Pembroke Park, 831 F. 2d 989 (11th Cir. 1987); Little v. City of North Miami, 805 F. 2d 962 (11th Cir. 1986); Shoultes v. Laidlaw, 886 F. 2d 114 (6th Cir. 1989); Bass v. Attardi, 868 F. 2d 45 (3rd Cir. 1989); Aitchison v. Raffiani, 707 F. 2d 96 (3rd Cir. 1983).

See also Owen v. City of Independence, 445 U.S. 662 (1980).

Reed v. Village of Shorewood, 704 F. 2d 943 (7th Cir. 1983) held that liability against the municipality is not precluded because defendants were found immune in their individual capacities. "The official acts of municipal policy makers are acts of the municipality for purposes of section 1983 liability...And the municipality's liability for such acts for which the policy-making officials might enjoy absolute immunity because the acts were legislative...in character" continues. The rationale of Owen "applies with as much force to legislative...as to executive officers." Reed, p. 953. Aichison v. Raffiani, 708 F. 2d 96 (3rd Cir. 1983) involved an action by a municipal council in abolishing the position of assistant building inspector.

The holder of the position alleged that the action was "politically motivated and in bad faith,serving as a subterfuge..." Page 97. The Third Circuit found legislative immunity protected the council members; however, this would not preclude municipal liability. These allegations are strikingly similar to those in the matter now before this Court. Justice O'Connor in St. Louis v. Praprotnik, 485 U.S. 112 (1987) warned against "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies" and stated "that most deliberate municipal evasions of the Constitution will be sharply limited." Page 127. In reasoning why the city could not be held liable for the alleged retaliatory layoff of the respondent by his supervisors she noted that the "Mayor and Aldermen enacted no ordinance designed to retaliate against

respondent or against similarly situated employees." Page 128. Footnote 3 of Justice Brennan's concurring opinion says that "where a municipality's governing legislative body inflicts the constitutional injury, the municipal policy inquiry is essentially superfluous: the city is liable under the statute whether its decision reflects a considered policy judgment or nothing more than the bare desire to inflict harm." Page 139. Vandenplas v. City of Muskego, 753 F.2d 555, 560 (7th Cir. 1985) stated in dicta that the motives of the city council "would presumably be relevant" in "a case where facts implicating the First Amendment were properly alleged." Personnel Administrator of Mass v. Feeney, 442 U.S. 256(1978) required a study of the intent of the legislators in determining whether their actions violated the Constitution. This case dealt with a

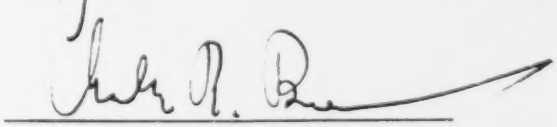
legislative enactment which afforded veterans preferences in public employment and the impact of such preference on female applicants since most veterans are male. The motives of the legislators was the key to determine the constitutionality of their enactments.

CONCLUSION

Certiorari should be granted in this case so that the law involving the issues hereinbefore raised may be settled and the petitioner may receive treatment consistent with the treatment afforded public employees in cases with similar facts before other United States Courts of Appeals and this Court.

For the foregoing reasons, petitioner requests that the Court grant her petition for writ of certiorari, and reverse the judgment below.

Respectfully submitted,



CHARLES R. BREWER

October 5, 1992

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARYJANE HOLLYDAY,

Plaintiff-Appellant,

v. No. 91-2079

GENE E. RAINEY, Chairman of the Buncombe County Commissioners, in his official capacity and is his personal capacity; DORIS P.GIEZENTANNER, in her official capacity and in her personal capacity; JESSE I. LEDBETTER; C.T. SOBOL, in his official capacity and in his personal capacity; WILLIAM H. STANLEY, in his official capacity and in his personal capacity; MICHAEL A. KIRSTEIN, in his official capacity and in his personal capacity; ROBERT THORNBERRY, JR., in his official capacity and in his personal

capacity,

Defendants-Appellees,

and

BUNCOMBE COUNTY, a North Carolina County,

Defendant,

v.

ROBERT CURTIS RATCLIFF,

Third Party Defendant-Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville.

Richard L. Voorhees, Chief District Judge.

(CA-89-236-A-C)

Argued: December 3, 1991

Decided: May 26, 1992

Before HALL and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hall

wrote the opinion of the court. Judge Luttig wrote an opinion concurring in part and concurring in the judgment. Senior Judge Butzner wrote a dissenting opinion.

COUNSEL

ARGUED: Charles Robinson Brewer, Asheville, North Carolina, for Appellant. William Alfred Blancato, HENDRICK, ZOTIAN, COCKLEREECE & ROBINSON, Winston-Salem, North Carolina, for Appellees.

OPINION

HALL, Circuit Judge:

Mary Jane Hollyday appeals the dismissal of her federal civil rights claims and related state claims. We affirm.

I.

Hollyday was hired by Buncombe County,

North Carolina, in January, 1987, to a newly-created position as office manager in the Assessor's Office. In the November, 1988, county election, Hollyday's political party was voted out of power. The county Board of Commissioners soon thereafter abolished her position. Contemporaneously with these events, the Assessor solicited applications for the position of assistant tax assessor, a position that had been budgeted for years, but had remained unfilled since before Hollyday's employment. Hollyday applied, but this position was also abolished by the Board of Commissioners before anyone had been offered the job.

Hollyday then brought this action against the County, the members of the Board, and two other county officials for

monetary, injunctive, and declaratory relief. Basically, she claimed that her constitutional rights of free speech and association were violated by the defendant's elimination of the office manager position and by the refusal to hire her for the assistant tax assessor job. She also included claims grounded in state law for intentional infliction of emotional distress and breach of contract. Her claims died in three stages: summary judgment, failure to state a claim, and refusal to exercise pendant jurisdiction.

II.

The magistrate judge recommended that the defendants' summary judgment motion be granted with respect to Hollyday's § 1983 free speech/association claims and the state-law claim for intentional infliction of emotional distress. The district court

adopted the magistrate judge's recommended conclusion of law that the doctrine of legislative immunity was a complete defense to these claims by all defendants. I agree.

As we have recently explained in Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988), "[w]here...the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." To prevail on her claims, Hollyday would necessarily have to show that her political affiliation was a determining factor in the Board of Commissioners' legislative decisions to abolish the position that she held and the position for which she applied. Either her case or the defense would perforce

require testimony of the legislators involved regarding their motives. See id.

Hollyday argues that legislative immunity is aimed only at protecting the purses of individual legislators and that it should not in any way bar her claims against the City itself. This argument misconstrues the fundamental rationale for the doctrine. Legislators must be permitted to discharge their legislative duties without fear of being subjected to the cost and inconvenience of a trial at which their motives come under scrutiny. Id.; Baker v. Mayor & City Council of Baltimore, 894 F.2d 679, 681-82 (4th Cir.) cert. denied, 111 S.Ct. 56 (1990). The doctrine of legislative immunity insulates a governmental entity from liability only in cases where the cause of action is dependent on finding that legislation was

enacted because of improper motives. Such is the case here.[1]

III.

The district court also dismissed Hollyday's § 1983 claim relating to the City's refusal to hire her for the assistant tax assessor position for failure to state a claim for which relief could be granted. Fed. R.Civ.P. 12(b)(6). This position had not been occupied for years prior to Hollyday's attempt to obtain the job, and the position was abolished before it was ever filled. Hollyday contends nevertheless that she had a protected property interest in the position. She has not, however, directed

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[1] The district court also granted summary judgment to defendant Thornberry, the County personnel officer, on the alternative ground of qualified immunity. I would hold that affirmance on the grounds of legislative immunity obviates the need to reach this alternative basis.

our attention to, nor has our research uncovered, any support for the proposition that a jobseeker has any property rights in a position that has never been occupied by the jobseeker and that has been completely abolished by a legislative act. We affirm on this alternative ground.

IV.

Hollyday also complains about the district court's decision to decline to exercise pendant jurisdiction over the remaining state claims. Inasmuch as her only argument is that the court erred in dismissing her federal claims, our affirmance of those rulings dictates affirmance of the discretionary decision to dismiss the pendant claims. See United Mine Workers of America v. Gibbs, 383 U.S.

715, 726-27 (1966).[2]

For the foregoing reasons, as explained more fully in the extensive analysis set forth in the magistrate judge's "Memorandum and Recommendation" and adopted by the district court, we affirm.

AFFIRMED

LUTTIG, Circuit Judge, concurring in the judgment and concurring in the opinion in part:

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[2] Hollyday also appeals the district court's refusal to strike the magistrate judge's order denying a motion to amend the complaint. The original complaint comprises 22 pages containing 80 paragraphs; the proposed amendment would have added seven pages containing 23 additional paragraphs. Aside from the obvious contravention of Fed.R.Civ.P.8(a)(2) ("a[complaint] shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief..."), there is no mention of how the amendment could have helped Hollyday avoid summary judgment and the Rule 12(b)(6) dismissal. Under these circumstances, we find no abuse of discretion.

I concur in parts 1, III, and IV of Judge Hall's opinion. Because I would affirm the district court's award of summary judgment to the defendants on Mary Jane Hollyday's First Amendment claim on grounds different from those relied upon by Judge Hall, however, I join only the judgment reached in part II of his opinion.

In part II, Judge Hall would extend absolute immunity to Buncombe County under 42 U.S.C. § 1983 for the constitutional violations alleged by Hollyday because the County's officers are absolutely immune from testifying about their conduct as legislators. Ante at 3-4. He concludes that this extension of the testimonial immunity of the County's officers derivatively to the county itself is compelled by this court's decisions in

Baker v. Mayor & City Council, 894 F.2d 679, cert. denied, 111 S. Ct. 56(1990), and Schlitz v. Virginia, 854 F.2d 43 (1988), which held that a city and a state, respectively, were immune from liability for alleged violations of the Age Discrimination in Employment Act, 29 U.S.C.§§621-634, because their defense to the allegations would require the privileged testimony of the city's and the state's officers as to their motives in enacting particular legislation. See Baker, 894 F.2d at 682; Schlitz, 854 F.2d at 46.

In my view, extension of Baker and Schlitz to the constitutional claim advanced by Hollyday in this case would be, at the very least, in substantial tension with, if not foreclosed by, the Supreme Court's decision in Owen v. City

of Independence, 445 U.S. 622 (1980), a decision not cited or discussed in either Baker or Schlitz. See also Monell v. Department of Social Servs., 436 U.S. 658, 701 (1978) (holding that "municipal bodies sued under § 1983" for constitutional violations "cannot be entitled to...absolute immunity"). In Owen, the Court held that a municipality is not entitled to qualified immunity under section 1983 based upon the good faith of its officers or agents. See id. at 638, 650. The Court first surveyed the common law and found that there was "no [common law] tradition of [qualified] immunity for municipal corporations" based upon the good faith of their officers or agents. Id. at 638. It then considered whether Congress intended to import into section 1983 either of the municipal immunities

that were recognized at common law. It concluded that Congress could not have intended either the common law municipal immunity for "governmental" (as distinguished from proprietary) activities or the immunity for "discretionary" or "legislative" (as distinguished from ministerial) activities to limit municipal liability under section 1983. See id. at 644-50.

As to governmental immunity, which it noted was grounded in the doctrine of sovereign immunity, the Court concluded that "[b]y including municipalities within the class of 'persons' subject to liability for violations of the federal Constitution and laws, Congress...abolished whatever vestige of the State's sovereign immunity the municipality possessed." Id. at 647-48.

As to discretionary or legislative immunity, which it explained was grounded in concerns for the separation of powers, it concluded that because "a municipality has no 'discretion' to violate the Federal Constitution," review of a municipality's conduct under section 1983 does not interfere with the municipality's policy discretion, which the immunity was accorded to preserve. Id. at 649. Having found that there was no tradition of municipal immunity based upon the good faith of the municipality's officers and that neither of the broader municipal immunities for which there existed a common law tradition could support an immunity of the kind sought by the City of Independence, the Court rejected the City's immunity defense.

The reasoning of the Court in Owen,

would appear to apply with equal force to a claim of absolute municipal immunity based upon the testimonial privilege of the municipality's officers and agents. There is no evidence that such an absolute immunity existed at common law. (Even if there were, presumably this court could not recognize it, given the Supreme Court's holding in Monell that there is no absolute municipal immunity under section 1983.) and the "governmental" and "legislative" municipal immunities discussed in Owen that were recognized at common law could not serve as foundations for recognition of such an absolute immunity, for the same reasons that they could not support the qualified immunity at issue in Owen.[1] Accordingly, I cannot

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[1] The Supreme Court has already intimated that a regional agency would not be immune from liability for damages

join part II of Judge Hall's opinion.

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caused by enactment of unconstitutional legislation simply because the individual regional legislators, who presumably have a greater entitlement to legislative immunity than municipal legislators, see note 2 infra, would be immune for their role in enacting the legislation. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 n.29 (1979) ("If the [regional legislators] have enacted unconstitutional legislation, there is no reason why relief against [the regional agency] itself should not adequately vindicate [the plaintiff's] interests."), quoted in Owen, 445 U.S. at 653 n.37; see also Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (Black, J., concurring) ("It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators.") And this court has specifically rejected as "unfounded" the notion that a "County derive[s] immunity from the legislative immunity claimed by "individual legislative officers. Scott v. Greenville County, 716 F.2d 1409, 1422 (4th Cir. 1983); see also Bruce v. Riddle, 464 F. Supp. 745, 749 (D.S.C. 1979)(permitting a suit alleging constitutional violations to proceed against a county as "not inconsistent with the...legislative immunity" of county officials), aff'd on other grounds, 631 F.2d 272 (4th Cir. 1980).

Rather than hold, as Judge Hall would, that Baker and Schlitz extend to constitutional claims against a municipality under section 1983, and thus that the doctrine of legislative immunity insulates from inquiry discussions that occur before an official even becomes a legislator, I would decide this case on the narrow ground that Hollyday simply has failed to meet her burden under Fed.R.Civ.P.56 to present a question of material fact as to an essential element of her claim.

To prevail against the County on her First Amendment claim, Hollyday must prove that the County abolished her position pursuant to an "officially adopted" decision to abolish through legislation positions held by persons with political affiliations different from that of the

County administration. See Monell, 436 U.S. at 690 ("[T]he action that is alleged to be unconstitutional action [must] implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the local government's][officers." (emphasis added)); accord, e.g., City of Canton v. Harris, 489 U.S. 378, 385 (1988); City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 477-78 (1986); City of Oklahoma City v.Tuttle,471 U.S. 808, 818 (1985). The only County officers with the authority to "establish [] final policy with respect to the subject matter in question" are the commissioners themselves. Pembaur, 475 U.S. at 483-84 (plurality opinion). Under the established law of this circuit,

however, as both Judges Hall and Butzner agree, the commissioners--and presumably their legislative aides, see Gravel v. United States, 408 U.S. 606, 616-22 (1972) -cannot be required to testify as to their intentions, objectives, and motivations during the time that they served as County commissioners.[2]

The only other evidence proffered by Hollyday is of conversations that occurred among the commissioners-elect and between them and the transition manager and

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[2] See Baker, 894 F.2d at 682; Schlitz, 854 F.2d at 45; cf. Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980) (immunity from liability). As a panel of this court, we are bound by these prior decisions. See e.g., Capital Produce Co. v. United States, 930 F.2d 1077, 1079 (4th Cir. 1991). The Supreme Court, however, has never addressed the question of whether local officials are entitled to legislative immunity. See Spallone v. United States, 493 U.S. 265, 278 (1990); Lake Country Estates, 440 U.S. at 404 n.26.

personnel director prior to the time the commissioners-elect became officers of the County. I believe that this evidence, assuming it is relevant at all, is alone insufficient to create a question of material fact as to whether abolition of Hollyday's position was effected pursuant to an official decision of the County to abolish positions held by individuals with contrary political views because, at the time of these conversations, none of the defendants were officers empowered to adopt and implement through legislation an official County decision to discriminate on the ground of political affiliation. See, e.g., Jett v. Dallas Indep. School Dist.,491 U.S. 701, 737 (1989); Praprotnik,485 U.S. at 127 (plurality opinion) ("[T]he authority to make municipal policy is necessarily the

authority to make final policy."); id. at 132 (Brennan, J., concurring in the judgment); Pembaur, 475 U.S. at 483-84 (plurality opinion); Dotson v. Chester, 937 F.2d 920, 924 (4th Cir. 1991); Crowley v. Prince George's County, 890 F.2d 683, 685-87 (4th Cir. 1989); cf. Baker, 894 F.2d at 681 (declining to "permit the advice or recommendations of low-level personnel to constitute the basis for" a local government's liability for age discrimination). This evidence, given Monell's requirement that the challenged action have been taken pursuant to an official decision of the County, is no more sufficient as a matter of law to withstand summary judgment than would be evidence that the defendants, when members of the Young Democrats, promised to abolish any position in County government

held by a Republican, if they were ever elected to the County's board of commissioners.

Because in my view Hollyday was required to, but did not, present at least some evidence from the time when the individual defendants were County commissioners that they acted with impermissible motives, I would, on the assumption that legislative abolition of a position can ever be actionable, [3] affirm

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[3] Judge Butzner would extend the Supreme Court's decisions in Rutan v. Republican Party, 110 S. Ct. 2729 (1990), Branti V. Finkel, 445 U.S. 507 (1980), and Elrod v. Burns, 427 U.S. 347 (1976), and hold that a municipality is liable under section 1983 for the facially neutral legislative abolition of a government position if the purpose of abolishing the position was to rid the government of the incumbent because of her contrary political views. Contra Piecznyski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989); Fraternal Order of Police Hobart Lodge #121 Inc. v. City of Hobart, 864 F.2d 551, 554-57 (7th Cir. 1988); cf. Rateree v. Rockett, 852 F.2d 946, 950-51

the district court's grant of summary judgment on the narrow ground that Hollyday failed to meet her evidentiary burden under Fed.R.Civ.P.56. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

BUTZNER, Senior Circuit Judge, dissenting:

I respectfully dissent, because the defense of legislative immunity is not a bar to Mary Jane Hollyday's cause of action that is based on the First and Fourteenth Amendments. While the county commissioners may be immune from the imposition of personal liability and from testifying, legislative immunity does not

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(7th Cir. 1988); Drayton v. Mayor & Council, 699 F. Supp. 1155, 1157 (D.Md. 1988), aff'd without opinion, 885 F.2d 864 (4th Cir. 1989). Because I conclude, contrary to Judge Butzner, that Hollyday's proffered evidence is insufficient to satisfy her burden under rule 56, I need not and do not reach this significant constitutional question.

bar a cause of action against the county or its officers performing executive functions. Nor does legislative immunity preclude testimony from persons who subsequently became commissioners or officials about events occurring prior to their present status.

I

Ms Hollyday is a well-known, active member of the Republican Party. Her complaint alleges that

> she had been a Vice Chairman of the Buncombe county Republican Party, Republican candidate for the North Carolina Senate from the 26th District, Vice Chairman of the North Carolina Republican Party, a delegate to the 1976 Republican National Convention, an Alternate Delegate to the 1980 Republican National Convention, a delegate to the 1984 Republican National Convention, and a statewide cochairman of the campaign of the late Republican United States Senator John East.

She also had served as staff director for

Senator East.

Ms Hollyday's supervisors considered her performance as manager of the assessor's office to be excellent. Her boss told the commissioners that although she carried "political baggage," her performance was good and she had not used politics in her job. Nevertheless, shortly after an election in which Democrats won a majority of the seats on the County Board of Commissioners, the commissioners eliminated her position. The commissioners then sought to hire an assistant assessor. But the county's personnel plan entitled Ms Hollyday to preference for that position. Confronted by Ms Hollyday's entitlement, the commissioners abolished the position of assistant assessor.

It is unnecessary for the purpose of

this dissent to recount the evidence and the reasonable inferences that can be drawn from the evidence on which Ms Hollyday relies. It is sufficient to note that a genuine issue of material fact exists concerning her claim of a constitutional tort and the county's claim that efficiency and economy dictated the elimination of the two positions.

II

The constitutional predicate for Ms Hollyday's cause of action is derived from Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980): "[T]he First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position

involved." Rutan v. Republican Party, 110 S.Ct. 2729, 2731-32 (1990). Branti prohibited the discharge of two assistant public defenders because of their political affiliation. Of significant import to Ms Hollyday's claim is the fact that the county legislators instigated the discharges in Branti. Also, in Branti the Court relied in part on the discharge of other public defenders because of their political affiliation as relevant evidence concerning the discharge of the two plaintiffs. 445 U.S. at 509-10. Similarly, Ms Hollyday relies on evidence that the commissioners swept out of office other Republican employees at about the same time that they terminated her employment.

Rutan extended the protection that the First Amendment affords public employees

to political patronage practices involving promotion, transfer, recall, and hiring. 110 S.Ct. at 2732. Rutan lends support to the aspect of Ms Hollyday's claim concerning the refusal to hire her for the assistant assessor's position. Moreover, this incident is relevant evidence with respect to her claim about the manager's position.

Although Elrod and Branti dealt with discharges, I believe that the county cannot avoid their constitutional mandate by the simple expedient of eliminating Ms Hollyday's job. Elimination of a job for purposes of political discrimination is tantamount to discharge. Infringement of constitutional rights by deception cannot cloak unlawful acts. The Supreme Court recently reiterated: "What the First Amendment precludes the government from

commanding directly, it also precludes the government from accomplishing indirectly." Rutan, 110 S.Ct. at 2738-39.

Whether Ms Hollyday can ultimately prevail is not an issue at this stage of the proceedings, and on that subject I express no opinion. She has, however, established a prima facie case of a constitutional tort. This brings us to the defense of legislative immunity.

III

The county bases its defense of legislative immunity on Schlitz v. Virginia, 854 F.2d 43 (4th Cir. 1988), and Baker v. Mayor and City Council of Baltimore, 894 F.2d 679 (4th Cir. 1990). But these cases dealt with public employees' claims of violation of the Age Discrimination in Employment Act. They are not applicable to a local government's

violation of the United States Constitution.

In Owen v. City of Independence, 445 U.S. 622,-657 (1980), the Court held that "municipalities have no immunity from damages liability flowing from their constitutional violations." Owen dealt with the claim of a former Chief of Police, whom the city manager summarily discharged after the city council adopted a resolution excoriating him and directing the city manager to take appropriate action. In a suit charging violation of his constitutional rights to procedural and substantive due process, the former Chief of Police named as defendants the city, the city manager who fired him, and the city council in their official capacities. The district court entered judgment for the defendants, and the court

of appeals affirmed on the ground that the defendants were entitled to qualified immunity. The Supreme Court reversed because the city was not immune.

Owen vindicated violations of the Fourteenth Amendment, but its principles are applicable to a violation of the First Amendment. In Tenney v. Brandhove, 341 U.S. 367 (1951), the plaintiff complained that a legislative committee violated his First Amendment right of free speech. The Court held that by enactment of the predecessor of 41 U.S.C. § 1983 Congress did not intend to abrogate the immunity of state legislators, which had its origins in 16th and 17th century English law and had been long recognized by the states for sound reasons of policy. 341 U.S. at 376. Tenney, however, did not hold that immunity of the legislators validated

their legislative action. 341 U.S. at 379-81 (Black, J., concurring).

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), extended legislative immunity to regional legislators charged with a constitutional tort, but it did not confer their immunity on the agency on which they served.

In Lake Country Estates the Court noted that it was not deciding whether persons performing legislative functions at the local level should be granted immunity. 440 U.S. at 404 n.26. Nevertheless, for the purpose of this appeal, I assume that county commissioners are entitled to legislative immunity even though they are charged with a constitutional tort. The commissioners' immunity, however, does not absolve the

county from liability, if any, for the conduct of the commissioners. This much is clear from Tenney, Owen and Lake Country Estates.

The district court also conferred legislative immunity on the county's director of personnel and on a Democratic campaign worker who became the volunteer manager of transition from the Democratic to the Republican commissioners. After the newly elected Democratic commissioners were seated, they made the volunteer manager a paid employee. The district court's grant of immunity to these individuals is much too broad. It must be confined within the bounds delineated in several Supreme Court cases.

In Gravel v. United States, 408 U.S. 606 (1972), a legislative aide was granted immunity from testifying before a grand

jury only to the same extent that the legislator would be immune. The aide was denied immunity with respect to acts that were not of a legislative character. 408 U.S. at 625. Similarly, in Dombrowski v. Eastland, 387 U.S. 82 (1967), the Court reiterated that legislators engaged in the sphere of legislative activity are immune not only from the results of legislation, but also from the burden of defending themselves. This doctrine, the Court explained, is less absolute for, though applicable to, legislative employees. 387 U.S. at 85. Therefore an aide to a legislator was not entitled to summary disposition of a complaint when controverted evidence was offered to show that he collaborated in an alleged violation of the Fourth Amendment. Under these circumstances, the Court held that

the plaintiff was entitled to a trial. 387 U.S. at 84.

The director of personnel and the transition manager are entitled to immunity from testifying about the commissioners' statements in the executive meetings of the board, the commissioners' motives, and communications of a legislative nature that they had with the commission. Ms Hollyday tendered evidence, however, that during the month between the elections and the swearing in of the new commissioners, the man who became transition manager had access to all personnel files and conferred with one or more of the successful candidates before they took office. There was discussion of personnel at this time. During this period the conferees undertook to create the job of transition manager

and to hire the volunteer as soon as the new commissioners took office. The doctrine of legislative immunity does not preclude relevant evidence of matters discussed at these conferences nor does it immunize the testimony of the conferees, even though subsequently they became commissioners and the volunteer became an employee.

In Kilbourn v. Thompson, 103 U.S. 168, 200-05 (1880), legislators who unconstitutionally punished Kilbourn for contempt were held to be immune. Nevertheless, the sergeant-at-arms who arrested Kilbourn pursuant to a legislative resolution, was not immune in an action for damages.

Similarly, in Powell v. McCormack, 395 U.S. 486, 501-06 (1969), legislative immunity did not bar judicial review of

the action of the sergeant-at-arms of the House of Representatives who withheld a congressman's pay in accordance with an unconstitutional resolution of the House.

These cases demonstrate that the director of personnel, who claims he took no part in the decision to terminate Ms Hollyday, does not have legislative immunity. He executed the procedures to accomplish her termination. His position is similar to that of the sergeants-at-arms in Kilbourn and Powell, and his lack of legislative immunity enable Ms Hollyday to obtain judicial review of her termination. Liability for his action can be attributed to the county, not by the doctrine of respondeat superior, but rather because the commissioners, at whose behest he acted, are the policy-making officials of the county. Monell v. New

York City Dep't of Social Services, 436 U.S. 658 (1978) (holding that action could be brought against city for gender-based discrimination that reflected official policy).

Like the plaintiff in Dombrowski, the controverted evidence entitles Ms Hollyday to have a jury consider her case. Because the district court summarily dismissed her complaint, I respectfully dissent.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-89-236

MARYJANE HOLLYDAY,)

Plaintiff,)

Vs.)

BUNCOMBE COUNTY, a North Carolina)

County; GENE E. RAINEY, Chairman)

of the Buncombe County)

Commissioners, in his official)

capacity and in his personal)

capacity; DORIS P. GIEZENTANNER,)

JESSIE I. LEDBETTER, C. T. SOBOL,)

and WILLIAM H. STANLEY, members of)

the Buncombe County Board of)

Commissioners, in their official)

capacity; DORIS P. GIEZENTANNER,)

JESSIE I. LEDBETTER, C. T. SOBOL,)

in their personal capacity;)

MICHAEL A. KIRSTEIN, in his official and in his personal capacity; and ROBERT THORNBERRY, JR., in his official and in his personal capacity.

Defendants/Third-Party Plaintiffs,

Vs.

ROBERT CURTIS RATCLIFF,

Third-Party Defendant.

ORDER

THIS MATTER is before the Court on Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Pleading No. 6) and Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56

(Pleading No. 22).

On August 30, 1990, pursuant to this Court's Standing Order of Designation, A-MISC. 1040, Chief United States Magistrate J. Toliver Davis filed a Memorandum and Recommendation in this case containing proposed findings of fact and conclusions of law in support of a recommendation that Defendants' motions to dismiss and for summary judgment be granted. Counsel for the parties were advised that any objections to the Magistrate's findings were to be filed in writing within ten (10) days after the service of the Recommendation. On September 10, 1990, Plaintiff filed objections to the Magistrate's Memorandum and Recommendation and requested the Court to strike the Magistrate's Order, dated August 30, 1990 (Pleading No. 51), and allow the Plaintiff

to amend her complaint. On September 26, 1990, Defendants responded to Plaintiff's objections.

The Court has carefully reviewed the Magistrate's Recommendation, conducted a de novo, review of the record, considered Plaintiff's objections to the Memorandum and Recommendation, and considered Defendants' response to Plaintiff's objections. In his findings, the Magistrate stated, "[a]t that time (January, 1987), the county board of commisioners was comprised of three republicans and one democrat." See Memorandum and Recommendation at 2 (August 30, 1990) (Pleading No. 52). Plaintiff's complaint alleges and the Defendants' answer admits that the Buncombe County Commission was composed of three republican commissioners and two democrat

commissioners prior to November, 1988. Accordingly, the Court modifies the Magistrate's findings to reflect that, in January, 1987, the Buncombe County Board of Commissioners was a five-member board comprised of three republican commissioners and two democrat commissioners. 28 U.S.C. § 636(9).

The Court finds that the Magistrate's remaining proposed findings of fact are supported by the record and that the proposed conclusions of law are consistent with current case law. The Court further finds no good reason to disturb the Magistrate's Order of August 30, 1990, denying Plaintiff's motion to amend complaint. Accordingly, the Court hereby accepts the Magistrate's Recommendations that the Defendants' motions to dismiss and for summary judgment should be

allowed. Plaintiff's request that the Court strike the Magistrate's Order of August 30, 1990, will be denied.

IT IS, THEREFORE, ORDERED that:

1. Defendants' motion for summary judgment, based on absolute legislative immunity as to Plaintiff's claims made pursuant to 42 U.S.C. §§ 1983 and 1985 and for intentional infliction of emotional distress, as to Defendant Commissioners Giezentanner, Sobol, Stanley, and Rainey in their individual and official capacities; Commissioner Ledbetter in his official capacity, county employees Kirstein and Thornberry in their official and individual capacities; and Defendant Buncombe County, North Carolina, is hereby ALLOWED;

2. Defendants' motion to dismiss Plaintiff's claim made pursuant to 42

U.S.C. § 1985 and her claim for failure to hire her for a position that was abolished is hereby ALLOWED pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action;

3. Defendants' motion for summary judgment based on qualified immunity as to Defendant Thornberry is ALLOWED in addition to absolute immunity;

4. Defendants' motion to dismiss Plaintiff's claim for breach of contract is ALLOWED but such dismissal is without prejudice; and

5. Plaintiff's request that the Court strike the Order filed by the Magistrate on August 30, 1990, denying her motion to amend is hereby DENIED.

THIS the 14th day of March, 19 91.

s\ Richard L. Voorhees

RICHARD L. VOORHEES

UNITED STATES DISTRICT

COURT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
A-C-89-236

MARYJANE HOLLYDAY,)
Plaintiff,)
Vs.)
BUNCOMBE COUNTY, a North Carolina)
County; GENE E. RAINEY, Chairman)
of the Buncombe County)
Commissioners, in his official)
capacity and in his personal)
capacity; DORIS P. GIEZENTANNER,)
JESSIE I. LEDBETTER, C. T. SOBOL,)
and WILLIAM H. STANLEY, members)
of the Buncombe County Board of)
Commissioners, in their official)
capacity; DORIS P. GIEZENTANNER,)
JESSIE I. LEDBETTER, C. T. SOBOL,)
in their personal capacity;)

MICHAEL A. KIRSTEIN, in his official and in his personal capacity; and ROBERT THORNBERRY, JR., in his official and in his personal capacity.

Defendants/Third-Party Plaintiffs,

Vs.

ROBERT CURTIS RATCLIFF,

Third-Party Defendant.

MEMORANDUM AND RECOMMENDATION

PURSUANT TO 28, UNITED STATES CODE, SECTION 636(b) and the standing Order of Designation entered December 7, 1989, by United States District Judge Richard L. Voorhees, the undersigned magistrate has before him defendants' Motion to Dismiss and Motion for Summary Judgment. The undersigned has also addressed plaintiff's

Motion to Strike by way of separate order filed simultaneously herewith. Having carefully considered defendants' Motion to Dismiss and Motion for Summary Judgment, reviewed the pleadings, and conducted a hearing, the undersigned magistrate respectfully submits the following findings of fact, conclusions of law, and recommendation.

FINDINGS

Plaintiff is a prominent republican. In January 1987, she was hired as office manager of the Buncombe County, North Carolina, reappraisal office. At that time the county board of commissioners was comprised of three republicans and one democrat. As a result of a general election held in November 1988, the composition of the board changed to four democrats and one republican. The newly

elected board began searching for ways to streamline county government and asked department heads to suggest areas for reduction in force.[1] The board was assisted by defendant Michael Kirstein, who was serving as transitional county manager.[2]

At the December 16, 1988, meeting of the board, a motion was made by defendant William H. Stanley, county commissioner, to abolish the position of county reappraisal office manager. Defendant commissioners Doris P. Giezentanner, C. T. Sobol, and Stanley voted in favor of the motion and defendant commissioner Jesse I. Ledbetter voted against it. Defendant commissioner and chairman of the board Gene E. Rainey did not vote, having left

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[1] Snyder Affidavit, para. 3.

[2] Kirstein Affidavit, para. 1.

the meeting earlier.[3] After the vote, plaintiff was laid off and given two weeks' severance pay in lieu of notice. Plaintiff was given notice of the termination by Charles A. Clark, county assessor, through execution of a personnel action form. Clark and defendant Robert Thornberry, Jr., county personnel director, executed the form.[4]

Since plaintiff was laid off, the position of office manager has never been reestablished and no one has been hired to take her former position.[5] Before plaintiff's position was abolished,

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[3] Complaint, para. 21; see also Snyder Affidavit, para. 4 and exhibit A.

[4] Thornberry Affidavit, para. 4 and exhibit A; see also Clark Affidavit, para. 3 and exhibit A.

[5] Snyder Affidavit, para. 4.; Thornberry Affidavit, para. 5; Clark affidavit. para. 4.

however, the county posted on December 8, 1988, a new position of assistant county assessor. Plaintiff and a number of others applied for the position, which was never filled because it was abolished by the board at a meeting held January 17, 1989.[6]

Plaintiff alleges that her position was abolished, she was terminated, and the county failed to hire her based on her political affiliation. Plaintiff sues defendants Giezentanner, Sobol, Stanley, Rainey, Kirstein, and Thornberry in their official and individual capacities; defendant Ledbetter in his official capacity only; and Buncombe County, North Carolina. Plaintiff's constitutional claims are asserted under 42, United

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[6] Snyder Affidavit, para. 6 and exhibit B.

States Code, Sections 1983 and 1985. Her pendent state-law claims sound in breach of contract and intentional infliction of emotional distress.

CONCLUSIONS

I. INTRODUCTION

In order to prevail in an action alleging termination or abolishment of a position based on political affiliation, a plaintiff's burden would be to prove that political affiliation was a motivating factor in the decision to terminate plaintiff or abolish her position. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). However, the motivation of the county board of commissioners cannot be inquired into because the "Doctrine of Legislative Immunity" bars this suit and mandates its expeditious dismissal. Summary judgment

should also be granted to defendants on plaintiff's claim for intentional infliction of emotional distress because defendants' affirmative defense of legislative immunity is applicable to the claim, as discussed infra. Due to the constitutional action being barred ab initio, this court should not exercise pendent jurisdiction over plaintiff's claim for breach of contract.

II. SUMMARY JUDGMENT BASED ON LEGISLATIVE IMMUNITY

A. Generally

Legislative immunity is an absolute bar to suit against members of legislative bodies concerning legislative actions. The doctrine prevents "legislators from having to testify regarding matters of legislative conduct, whether or not they

are testifying to defend themselves...." Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 46 (4th Cir. 1988).

B. Purpose

Immunity is designed to "shield officials not only from ultimate liability, but, so far as possible, from the burdens of litigation itself." Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J. concurring). As foreseen by Judge Phillips, a certain amount of burden is shouldered by legislative officials in presenting their defenses. Plaintiff has submitted numerous affidavits, and deposed many defendants, even though "the question of ...immunity is not whether a constitutional right has been violated." Id.

C. Constitutional Claims

Plaintiff's strongest argument against the availability of legislative immunity to the defendant county commissioners relies on a footnote found in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). In that note, former Justice Brennan reserved the question of whether legislative immunity applied to local governing bodies.

> Whether individuals performing legislative functions at the purely local level...should be afforded absolute immunity from federal damages claims is a question not presented in this case.

Id. at 404, n.26. Justice Marshall noted in his dissent that there was little room to argue that the doctrine was inapplicable to local governing bodies:

> [T]he majority's reasoning leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a

> trial" will impede officials in the "'uninhibited discharge of their legislative duty,'"...applies with equal force whether the officials occupy local or regional positions.

Id. at 408-09 (Citation omitted). Plaintiff's argument rests upon "the little room" afforded by the Court in Lake Country Estates. What "room" was left by the Court in that case was soon foreclosed by the Court of Appeals for the Fourth Circuit in Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980).

The Fourth Circuit recently reiterated that legislative immunity is applicable at the municipal level, Baker v. Mayor and City Council of Baltimore, 894 F.2d 679 (4th Cir. 1990); and, finding that the district court's dismissal of the action based on legislative immunity was proper, held:

> It is beyond dispute that municipal legislators enjoy the protection of

> immunity when acting in the sphere of legitimate legislative activity.
>
> ***
>
> The act of eliminating a position altogether instead of merely terminating the employment of a public employee is a uniquely legislative function.

Id. at 681-82. The applicability of immunity to local legislative bodies is supported by Collinson v. Gott, supra, in which Judge Wilkinson concurred and stated:

> Conducting a public meeting to discuss plans for the reorganization of county government fits comfortably within the definition of the legislative function originally referenced by Justice Frankfurter in Tenney and applied by this circuit in Riddle to local officials:
>
> > I will not confine it to delivering an opinion, uttering a speech...but will extend it to the giving of a vote,...and to every other act resulting from the nature, and in the execution, of the office...

Id. at 1008 (quoting Tenny v. Brandhove,

341 U.S. 367 (1951)).[7] Judge Wilkinson further stated that "[t]he flow of information through that [legislative] process could be severely jeopardized if every public meeting carried with it the threat of civil liability, not to mention punitive damages." Id.

It is undisputed that the position of manager of the county assessor's office and the position of assistant county assessor were abolished by a legislative act of the county board of commissioners. There is also no dispute as to the statutory authority of the board to abolish the positions[8] or the

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[7] In Tenney, the court quoted Coffin v. Coffin, 4 Mass. 1, 27 (1808).

[8] North Carolina General Statute 153A-76 provides: "The board of commissioners may create, change, abolish, and consolidate offices, positions, departments, boards,

constitutionality of the enabling statute.[9] Therefore, plaintiff's claims against the members of the board in their individual and official capacities, made pursuant to 42, United States Code, Sections 1983 and 1985,[10] are absolutely barred by the doctrine of legislative immunity.

Legislative immunity also bars the suit against Defendant Kirstein, a county

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commissions, and agencies of the county government, may imposed ex officio duties of more than one office on a single officer, may change the composition and manner of selection of boards, commissions and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs...." (Emphasis added.)

[9] See Goldsmith v. Mayor and City Council of Baltimore, 845 F.2d 61 64 (4th Cir. 1988).

[10] Furthermore, plaintiff fails to state a cause of action under Section 1985, as discussed infra.

official who recommended that the board abolish the position held by plaintiff. Persons who aid legislators in "direct assistance of legislative activity [are] entitled to absolute immunity." Aitchison v. Raffiani, 708 F.2d 96, 99-100 (3d Cir. 1983). This horizontal extension of immunity afforded by the Court of Appeals for the Third Circuit is appropriate in light of the immunity granted aides to members of Congress extended by the Supreme Court. A Senate employee is treated as if a member for purposes of applying Speech or Debate Clause protections because a Senator and his or her aide are treated as one. Gravel v. United States, 408 U.S. 606, 616 (1972). "[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the People

to representation in the democratic process." Spallone v. United States, _____U.S._____, 110 S.Ct. 625, 634 (1990).

The suit is also barred by the doctrine of legislative immunity as to Defendant Thornberry in his individual and official capacities. Thornberry is a county employee who carried out the board's decision by executing the employee action form. The doctrine is applicable because Thornberry's defense, in his individual capacity, would likely be through the testimony of board members as to the motivation behind the legislation abolishing the position held by plaintiff. Legislative immunity extends to causes of action where legislators could be compelled to testify on behalf of a non-legislator as to a legislative matter. Schlitz v. Commonwealth of Virginia,

supra, at 46. The suit against county employee Thornberry in his official capacity is also barred because it is just another way of suing the county government. Brandon v. Holt 469 U.S. 464, 471 (1985); Kentucky v. Graham, 473 U.S. 159, 165 (1985).

The constitutional claims must also be dismissed as to Buncombe County, North Carolina. The possibility that legislators would have to testify as to motives behind legislation prohibits suit against the county. See Baker v. Mayor and City Council of Baltimore, supra, at 682.

D. Intentional Infliction of Emotional Distress

As an exception to United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966), discussed infra, summary judgment is

proper as to plaintiff's state-law claim of intentional infliction of emotional distress because defendants' federal defense--the doctrine of legislative immunity--extends to that claim. The elements of the tort are: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." Hogan v. Forsyth Country Club, 79 N.C. App. 483, 488 disc. rev. denied, 317 N.C. 334 (1986). Plaintiff must prove that defendants intentionally or recklessly caused her severe emotional distress. Dickens v. Puryear, 302 N.C. 437 (1981). In attempting to do so, plaintiff again tries to put at issue the motives behind the board's legislative decision. Because motivation behind legislative acts cannot be properly put at issue, the doctrine of

legislative immunity bars plaintiff's claim against each defendant. Therefore, the undersigned will recommend that summary judgment be granted to defendants as to plaintiff's claim of intentional infliction of emotional distress.

E. Summary

To the extent the submitted affidavits go to the motives behind the board's action,[11] they have not been considered because issues of motive are not reached unless procedural bars are overcome. Plaintiff cannot overcome the absolute bar of legislative immunity. While courts traditionally abhor procedural default, the doctrine of legislative immunity is firmly rooted in the development of this country's jurisprudence. The doctrine

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[11] Affidavits concerning Defendant Thornberry, discussed infra, and his claim of qualified immunity are excepted.

developed out of the English Civil War and parliamentary struggles of the 16th and 17th centuries, was thereafter recognized at common law, and became a premise upon which this nation was founded. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra, at 404.

The undersigned will recommend that defendants' Motion for Summary Judgment on plaintiff's federal claims made pursuant to 42, United States Code, Sections 1983 and 1985, and state-law claim for intentional infliction of emotional distress, be granted as to: (1) commissioners Giezentanner, Sobol, Stanley, and Rainey in their individual and official capacities; (2) commissioner Ledbetter in his official capacity; (3) county employees Kirstein and Thornberry in their official and individual

capacities; and (4) Defendant Buncombe County, North Carolina.

III. MOTION TO DISMISS

A. Failure-to-Hire Claim

There is no authority cited for the plaintiff's position that a constitutional violation occurs where no one is hired to fill a newly created and later abolished position. Before plaintiff's own position was terminated, the county created a new appraisal job. After she was terminated, she applied for the newly created position, which was abolished without anyone being hired. Therefore, plaintiff's claim based on failure to hire for a position that was never filled should be dismissed pursuant to Rule 12(b), Federal Rules of Civil Procedure, for failure to state a cause of action.

B. Section 1985 Cause of Action

Plaintiff alleges that defendants violated 42, United States Code, Section 1985, by conspiring to terminate her employment in retaliation for her political affiliation. Section 1985 requires that a plaintiff be a member of a suspect class and that the conspiracy be directed at her due to her membership in the suspect class. Assuming, arguendo, that plaintiff was targeted for her political affiliation, she fails to state a cause of action because she is not a member of a suspect class. In Harrison v. KVAT Management, Inc., 766 F.2d 155 (4th Cir. 1985), the court held that republicans are not a class entitled to protection under Section 1985 and that a person who is terminated from employment because of party affiliation may not recover under Section 1985. See also

United Brotherhood of Carpenters v. Scott, 463 U.S. 825 (1983). Therefore, the undersigned will recommend that defendants' Motion to Dismiss as to plaintiff's claim under Section 1985 be granted.

IV. QUALIFIED IMMUNITY

Defendant Thornberry is also entitled to qualified immunity. Qualified immunity applies except where plaintiff can show that government officials, in performing discretionary functions, engaged in conduct violative of clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Collinson v. Gott, supra, at 998. Such a showing must be made before the commencement of discovery. Mitchell v. Forsyth, 472 U.S.

511, 526 (1985). Plaintiff has not shown, and apparently is unable to show, that Thornberry's execution of the board's directive to terminate the position violates any clearly established law. See Anderson v. Creighton, 483 U.S. 635 (1987). The focus is not on the right, but on the conduct challenged. Id. at 639. The "reasonable person" asks whether someone in defendant's official position, with the information he possessed, would have known his conduct violated clearly established rights. Id. at 641.

> In analyzing a claim of qualified immunity it is therefore necessary first to identify the specific constitutional right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that

> right. The first two of these inquiries present pure questions of law for the courts....The third...may sometimes require factual determinations respecting a defendant's conduct and circumstances, but the test's ultimate application is also a matter of law for the court.

Collinson v. Gott, supra, at 998. Plaintiff having presented no evidence upon which the court could find that a reasonable person, in the position of Thornberry, could have known he was carrying out anything but a lawful directive based on a facially valid legislative act, the undersigned must also recommend that defendants' Motion for Summary Judgment based on qualified immunity be granted.

V. PENDENT CLAIM FOR BREACH OF CONTRACT

Plaintiff's remaining pendent state-law claim, sounding in breach of contract,

should be dismissed without prejudice. The doctrine of pendent jurisdiction provides that a federal court's original jurisdiction extends to non-federal claims when the federal question is substantial and the claims asserted could be brought in one proceeding. The Supreme Court has found:

> [If] considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in the federal courts to hear the whole.

United Mine Workers v. Gibbs, supra, at 727 (1966). Pendent jurisdiction is a common-sense policy of conservation of judicial resources and prevention of repetitive litigation. Rosado v. Wyman, 397 U.S. 397 (1970). Here, there is no federal question, inasmuch as the federal

claims are barred ab initio, and all that remains is a question of contract governed by state law. Therefore, dismissal of the state claim for breach of contract would be proper, Tarantino v. Baker, 825 F.2d 772, 779 (4th Cir. 1987); and the undersigned will recommend that the claim be dismissed without prejudice.

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED, that:

(1) as to commissioners Giezentanner, Sobol, Stanley, and Rainey in their individual and official capacities; commissioner Ledbetter in his official capacity; county employees Kirstein and Thornberry in their official and individual capacities; and defendant Buncombe County, North Carolina, that defendants' Motion for Summary Judgement,

based on absolute legislative immunity as to plaintiff's claims made pursuant to 42, United States Code, Sections 1983 and 1985, and for intentional infliction of emotional distress, be GRANTED;

(2) defendants' Motion to Dismiss plaintiff's claim made pursuant to 42, United States Code, Section 1985, and plaintiff's claim for failure to hire her for a position that was abolished, be GRANTED, pursuant to Rule 12(b), Federal Rules of Civil Procedure, for failure to state a cause of action;

(3) defendants' Motion for Summary Judgment as to Defendant Thornberry, based on qualified immunity, be GRANTED, in addition to absolute immunity; and

(4) defendants' Motion to Dismiss plaintiff's claim for breach of contract be GRANTED, without prejudice to

plaintiff.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within ten (10) days of service of same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986); United States v. Schronce, 727 F.2d 91 (4th Cir.) cert. denied, 467 U.S. 1208 (1984).

This Memorandum and Recommendation is entered in response to defendants' Motion to Dismiss (#6) and Motion for Summary Judgment (#22).

Respectfully submitted, this the 30th day of August, 1990.

s\ J. Toliver Davis

J. TOLIVER DAVIS

UNITED STATES MAGISTRATE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

July 7, 1992

No. 91-2079

CA-89-236-A-C

MARYJANE HOLLYDAY

Plaintiff - Appellant

v.

GENE E. RAINEY, Chairman of the Buncombe County Commissioners, in his official capacity and in his personal capacity; DORIS P. GIEZENTANNER, in her official capacity and in her personal capacity; JESSE I. LEDBETTER; C. T. SOBOL, in his official capacity and in his personal capacity, WILLIAM H. STANLEY, in his official capacity and in his personal capacity; MICHAEL A. KIRSTEIN, in his official capacity and in

his personal capacity; ROBERT THORNBERRY, JR., in his official capacity and in his personal capacity

Defendants - Appellees

and

BUNCOMBE COUNTY, a North Carolina County

Defendant

v.

ROBERT CURIS RATCLIFF

Third Party Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant filed a petition for rehearing with suggestion for rehearing in

banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Luttig. Judge Butzner dissents.

For the Court,

/s/ Bert M. Montague

CLERK

Supreme Court, U.S.
FILED
NOV 5 1992
OFFICE OF THE CLERK

No. 92-656

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARY JANE HOLLYDAY,

Petitioner,

v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARY JANE HOLLYDAY,

Petitioner,

v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNTER-STATEMENT OF THE CASE

Plaintiff, Mary Jane Hollyday, was hired by Buncombe County, North Carolina, in January 1987, to fill the newly-created position as office manager in the tax assessor's office. The position was

established by the Board of County Commissioners.

There was a general election in Buncombe County for county commissioner in November 1988. A prominent issue for the Democratic candidates during the campaign was whether to reorganize county government. In the election, the Republican majority was voted out and the Democrats assumed a majority position on the Board of Commissioners.

After the election, the newly elected commissioners began searching for ways to streamline county government. They asked department heads if there were any areas where reductions in force could be made and also asked Michael Kirstein, who was serving as transitional county manager, to review the organization of county government to determine if any positions could be eliminated in order to save

money.

At a Board of Commissioners meeting on December 16, 1988, a motion was made to abolish the office manager position in the tax assessor's office. The motion passed three to one. Plaintiff was subsequently laid off because the position she occupied had been abolished.

The duties performed by plaintiff before abolishment of the position were transferred to other employees in the tax assessor's office. The reappraisal project on which plaintiff had been working was successfully completed. Abolishing the position did not adversely affect completion of the reappraisal project. The position has never been re-established and no one was ever hired to assume those duties.

Contemporaneously with abolishment of the office manager's position,

applications for the position of assistant tax assessor were solicited. This position had been budgeted for several years, but had remained unfilled since before plaintiff's employment. Plaintiff applied for this position, but it was abolished before anyone was offered the job.

Plaintiff filed suit under 42 U.S.C. Section 1983 contending that the office manager position was abolished in retaliation for her exercise of first amendment rights, specifically, her political affiliation. Plaintiff has sued Democratic commissioners Rainey, Sobol, Stanley and Giezentanner in their official and individual capacities, Republican commissioner Ledbetter in his official capacity, and Buncombe County. She has also sued the personnel director, Robert Thornberry, in his official and individual

capacities and Michael Kirstein, who was serving as transitional county manager, in his official and individual capacities.

Thornberry had no involvement whatsoever in the decision to abolish the office manager's position. His only involvement in this case was to execute a personnel action form that caused plaintiff to be laid off pursuant to the facially valid directive of the Board of Commissioners that the position held by plaintiff be abolished.

Kirstein's only involvement was to make recommendations to the Board of Commissioners on areas where the county's personnel budget could be streamlined. The North Carolina General Assembly has delegated the responsibility for organizing county government to the Board of Commissioners in each county. By statute, the Board of Commissioners has

authority to "create, change, abolish and consolidate offices, positions, departments, boards, commissions, and agencies of the county government." N.C. Gen. Stat. Section 153A-76 (Resp. App. at 1a). Thus, Kirstein's only involvement in this matter was to advise the Board of Commissioners on matters within their legislative province.

REASONS FOR DENYING WRIT

1. The issues raised by plaintiff in her Petition for Writ of Certiorari were not determinative of the Fourth Circuit's decision.

Defendants moved for summary judgment in the district court. The motion was supported by affidavits and briefs which established several key facts that were uncontested by plaintiff in the proceedings below. Some of the key facts established below that plaintiff has not

contested are: (1) plaintiff's position was abolished by a legislative act; (2) the position has never been re-established, nobody was hired to replace plaintiff and her duties were successfully reassigned to other employees; (3) plaintiff was laid off, not terminated, because the position she held was abolished; and (4) another job plaintiff applied for was abolished by a legislative act and nobody was ever hired. On these undisputed facts, the district court granted summary judgment for defendants. The Fourth Circuit affirmed in a decision written by Judge Hall. Judge Luttig concurred in the result on different grounds than those relied upon by Judge Hall. Judge Butzner dissented.

The specific reasons argued by plaintiff as grounds to support issuing a writ of certiorari are discussed by

defendants in more detail below. It is important at the outset to note, however, that the decision of the Fourth Circuit did not turn on the issues raised by plaintiff in her Petition. Instead, the Fourth Circuit's decision was based on the particular facts of this case and on Judge Luttig's conclusion that plaintiff failed to meet her evidentiary burden under Fed.R.Civ.P. 56.

Judge Hall concluded that legislative immunity barred plaintiff's claims against the individual commissioners and their aides where plaintiff sought to challenge the legislative decision to abolish a public position. Abolishing a public position is an exercise of legislative power that may be executed by the state at its pleasure. Goldsmith v. Mayor and City Council of Baltimore, 845 F.2d 61, 64 (4th Cir. 1988). Judge Hall further held in

accordance with recent fourth circuit precedent, Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988), and Baker v. Mayor and City Council of Baltimore, 894 F.2d 679 (4th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 56 (1990), that regardless of who is a party to the action, the county commissioner-legislators cannot be required to testify about their reasons and motives for adopting the legislation which abolished the office manager position. Concluding that the county itself would be unable to defend the action without testimony from the commissioners about their reasons and motivations for enacting the legislation, Judge Hall concluded that plaintiff could not pursue her claims against the county.

Concurring in the result, Judge Luttig did not decide the immunity issues upon which Judge Hall relied and which

form the basis of plaintiff's Petition for a Writ of Certiorari. Rather, Judge Luttig ruled that plaintiff did not meet her burden under Fed.R.Civ.P. 56 of presenting some evidence that she was retaliated against or that abolishment of her position was caused by some custom or policy of the county.

Judge Luttig correctly applied Rule 56 as required by Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Plaintiff presented no evidence to establish that abolishment of the office manager position was motivated by anything other than a desire to streamline county government. Furthermore, plaintiff failed to identify any custom or policy of the county that might have led to abolishment of the position. Thus, the Fourth Circuit's decision was ultimately based on plaintiff's lack of evidence to support

her claims of retaliation and not on the issues raised in her Petition for Writ of Certiorari.

Regardless of the basis of the Fourth Circuit's decision in this case, the writ should not be issued. Judge Hall's opinion, which plaintiff seeks review of, is consistent with decisions of this Court and does not address matters which need to be reviewed by the Supreme Court.

2. Applying legislative immunity to local legislators is consistent with decisions of the Supreme Court and of other circuit courts of appeal.

The doctrine of legislative immunity protects public officials engaged in legislative functions not only from the consequences of litigation but from the burden of defending themselves. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). The purpose of the doctrine is to prevent legislators from having to testify

regarding matters of legislative conduct, regardless of whether they are testifying to defend themselves or in a proceeding to which they are not parties. Gravel v. United States, 408 U.S. 606, 616 (1972). The immunity assures legislators that they may have wide ranging debates and make the hard decisions that face them without the fear of having to account for their decisions in a court. Id.; Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

Legislative immunity was specifically extended by this Court to state legislators in Tenney, and to regional legislators in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The immunity was also extended to the Supreme Court of Virginia where it was engaged in legislative functions that had been delegated to it by Virginia's state legislature in Supreme

Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).

The legislative authority to abolish a public position exercised in this case was delegated to the Buncombe County Board of Commissioners by North Carolina's General Assembly. See N.C. Gen. Stat. Section 153A-76 (Resp. App. at 1). Judge Hall's conclusion that legislative immunity protects the county commissioners when fulfilling legislative responsibilities that have been delegated to them by the state legislature is consistent with this Court's holding in Supreme Court of Virginia v. Consumers Union. Furthermore, every circuit that has addressed the issue has concluded that local legislators are protected by legislative immunity. See Shoultes v. Laidlaw, 886 F.2d 114, 117 (6th Cir.

1989); Rateree v. Rockett, 852 F.2d 946, 949 (7th Cir. 1988); Healy v. Town of Pembroke Park, 831 F.2d 989 (11th Cir. 1987); Aitchison v. Raffiani, 708 F.2d 96, 98-99 (3d Cir. 1983). No case has been located holding that legislative immunity does not extend to local legislators.

The consistent application of legislative immunity to local legislators by the Fourth Circuit and other courts of appeal is consistent with decisions of the Supreme Court and is not a matter that requires review by the Supreme Court.

3. Applying legislative immunity to legislative aides is consistent with decisions of the Supreme Court.

Plaintiff contends that the Fourth Circuit misconstrued Supreme Court precedent in extending legislative immunity to persons who execute decisions of local legislatures. Plaintiff does not specify whether her argument is directed

to Mr. Thornberry, the personnel director, or Mr. Kirstein, the transitional county manager.

With regard to Mr. Thornberry, Judge Hall held that legislative immunity barred the claims against him because defending the claims would require testimony from the county commissioners about their motives in abolishing the office manager position. Judge Hall did not reach the issue of qualified immunity which the district court held would protect Thornberry.

Thornberry's only action was to execute a personnel action form that caused plaintiff to be laid off because her position had been abolished. Such action was ministerial in nature and was taken based on a facially valid enactment of the Board of County Commissioners.

Plaintiff relies on Powell v.

McCormack, 395 U.S. 486 (1969), Dombrowski v. Eastland, and Kilbourn v. Thompson, 103 U.S. 168 (1881) in support of her argument. Each of those cases are easily distinguishable from the facts of this case. In Powell and Kilbourn, the Sergeant at Arms of the United States House of Representatives was sued to prevent him from taking action that had been mandated by Congress. The issues in those cases could be decided by looking at the face of the legislation in issue and did not require an inquiry into the motives underlying the litigation. In Dombrowski, the defendant for whom legislative immunity was not applied was alleged to have been engaged in planning illegal raids to secure property in violation of the Fourth Amendment. As noted by the Court in Gravel, "relief could be afforded [in Powell, Kilbourn and

Dombrowski] without proof of a legislative act or the motives or purposes underlying such an act." Gravel, 408 U.S. at 621.

Unlike Powell, Kilbourn and Dombrowski, plaintiff cannot recover from Thornberry without proof of the motives or purposes underlying the legislative act to abolish the office manager position. Thus, the decision as to Thornberry is consistent with this Court's statements in Gravel. Furthermore, the cases relied upon by plaintiff were decided before development of the qualified immunity defense which was found to be applicable to Thornberry by the district court. See Pet. App. at 70a-72a. Thus, the result as to Thornberry is correct without regard to the issues raised by plaintiff.

As noted above, Kirstein's only involvement in this matter was to advise the county commissioners on matters within

their legislative province. In Gravel, the Court held that legislative immunity extends to the conduct of legislative assistants if the legislator himself would be entitled to claim the protection of legislative immunity. Gravel, 408 U.S. at 616-17. The Court noted that the day to day work of such aides is so critical to legislators' performance that they must be protected by legislative immunity. Id. Furthermore, plaintiff has presented not even a shred of evidence to suggest that Kirstein consciously or subconsciously retaliated against her.

The application of legislative immunity to Thornberry and Kirstein is entirely consistent with this Court's decision in Gravel and the writ should not be issued on this basis.

4. Applying legislative immunity to claims for non-monetary relief is consistent with decisions of the Supreme Court.

In Section III of plaintiff's petition, she argues that the act of abolishing the office manager position may not have been a legislative act and that legislative immunity would not bar claims for declaratory or injunctive relief.[1] On both grounds, Judge Hall's opinion is consistent with Supreme Court precedent.

First, plaintiff should be barred from arguing that the decision to abolish her position was not a legislative act. At no point in the proceedings below did

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[1] Plaintiff also argued in Section III of her petition that abolishing the office manager position constitutes a bill of attainder in violation of U.S.Const. Art. I, Sec. 9. Plaintiff cites no authority for this proposition which was not even raised in the courts below. This is not a ground on which to grant review in this case.

plaintiff contend that the action of abolishing the office manager position was not a legislative act. See Pet.App. at 60a (Magistrate Davis found "[i]t is undisputed that the position of manager of the county assesor's office and the position of assistant county assessor were abolished by a legislative act of the county board of commissioners.").

Plaintiff's reliance on Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. ____, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) do not address the issues raised by legislative immunity. Elrod, Branti and Rutan, concern the purely administrative decisions of determining who should be employed for a public position after that position has been established by the appropriate governing body or, after

positions are eliminated, determining which of several persons occupying identical positions should be laid off (i.e. reducing the number of police officer positions and deciding which of several incumbent police officers should be laid off). Those cases do not address the situation presented here which concerns the legislative decision about whether or not a particular position should be created or abolished. The authority of the county to create or abolish positions is well established, See Goldsmith, 845 F.2d at 64.

Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20 (1st Cir. 1992), cited by plaintiff, is distinguishable from the instant case and does not support plaintiff's contention that the abolishment of the office manager position by the Board of Commissioners was not a

legislative act. In Acevedo-Cordero, a new city administration eliminated approximately 600 positions in the City's civil service and also identified the particular employees to be terminated. Plaintiffs alleged that their positions were being terminated for political purposes so the defendants could replace them with members of their own party. Acevedo-Cordero, 958 F.2d at 21.

In contrast, plaintiff in the instant case, has never alleged that the office manager position was abolished and that she was laid off so that defendants could replace her with someone of their own party. Indeed, the undisputed evidence in this case is that plaintiff has never been replaced.

Furthermore, in Acevedo-Cordero, the district court was presented with evidence on cross motions for summary judgment that

raised a factual issue about whether the action in question was legislative or administrative. Because there was a factual dispute about the threshold issue of whether there was a legislative act, the Court did not apply legislative immunity. In contrast, plaintiff in the instant action presented no evidence contesting defendants' evidence that abolishment of the office manager position was a legislative act and conceded that it was a legislative act. Acevedo-Cordero and the instant case turned on their own particular facts and the application of summary judgment principles by the lower courts to the facts presented by the parties and not on some differing interpretations or application of legislative immunity.

Plaintiff's contention that legislative immunity may not apply to

claims for declaratory or injunctive relief is at odds with this court's holding in Supreme Court of Virginia v. Consumers Union. In Consumers Union, it was specifically held that legislative immunity bars claims for declaratory or injunctive relief. Consumers Union, 446 U.S. at 732-34.

Other cases relied upon by plaintiff are distinguishable. Calhoun v. St. Bernard Parrish, 937 F.2d 172 (5th Cir. 1991), concerned issuance of a building permit, not abolishment of a position which is the issue in the instant case. In Calhoun, the legislative action could be attacked on its face and was not dependent on proof of motive which is essential to plaintiff's claims.

Plaintiff has also cited Harlow v. Fitzgerald, 457 U.S. 800 (1982), in support of her claim that legislative

immunity does not apply in this case. Harlow, is a leading case in the area of qualified immunity and does not discuss or limit the application of legislative immunity.

5. Applying legislative immunity to bar plaintiff from proceeding against Buncombe County where local legislators would be forced to testify about legislative acts to defend the County is consistent with decisions of the Supreme Court.

To establish a claim against Buncombe County and against the defendants sued in their official capacity, plaintiff was required to prove that abolishment of the office manager position and her subsequent layoff was caused by a policy or custom of the county. See City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988). Plaintiff has not presented evidence of any general policy or custom that may have caused abolishment of the office manager position. Indeed, the county's Personnel

Policy and Procedural Manual specifically protects the right of county employees to participate in political activities. (Joint App. at 120). Judge Luttig noted that plaintiff failed to present any evidence to support a finding that her layoff was the result of any policy or custom of the county. Because plaintiff did not establish a factual basis to support a finding that the county could be liable, it is premature to address the issue of whether legislative immunity could bar the claims against the county.

Nevertheless, Supreme Court precedent requires that legislative immunity be applied to protect legislators from testifying about their legislative activities regardless of whether they are parties to the underlying action or are merely witnesses for another entity that has been sued by plaintiff. Plaintiff has

not alleged any general policy of the county that could support her claims against it. Instead, she focuses on the single act of abolishing the office manager position which has been conceded to be a facially valid legislative act. Presumably, plaintiff intended to rely on that single act to establish a custom or policy of the county. To use such an act as a basis for liability against the county plaintiff would have to inquire about the legislators' motives for enacting the legislation. This, the doctrine of legislative immunity forbids. Because plaintiff's attempts to assert her claims against the county would necessarily infringe upon the purposes underlying legislative immunity, Judge Hall correctly concluded that she may not pursue her claim.

In Gravel, an aide to a United States

Senator was subpoenaed to testify before a grand jury that was investigating whether there were any violations of federal law in connection with release and publication of the Pentagon Papers. The Senator moved to quash the subpoena to prevent his aide from having to testify. This Court held that the aide could not be required to testify about conduct that would be protected if it had been performed by the Senator himself even though neither the Senator nor his aide were parties to the underlying proceeding. Gravel, 408 U.S. at 616-21.

Legislative immunity is not only a shield from damages, but protects legislators from the burdens of litigation and from being "questioned in any other place [besides the legislative body itself]" about legislative actions. U.S. Const. Art. I, Sec. 6., construed in

Tenney, 341 U.S. at 372-73 (emphasis added). Likewise, Judge Hall correctly concluded that the county commissioners could not be forced to testify about matters before their legislative body even though they would not be called upon to answer personally for the conduct in question.

Plaintiff's assertion that this Court has not applied governmental immunity to a legislative body is incorrect. This Court held in Consumers Union that legislative immunity barred claims against members of the Supreme Court of Virginia and the Court itself when the Court was exercising a legislative function that had been delegated to it by the state legislature. Consumers Union, 446 U.S. at 731-34, 100 S.Ct. at 1974-76.

The plaintiff points to cases that are distinguishable from the instant case

in support of her argument. In Aitchison v. Raffiani, the Court held that legislative immunity protected individual legislators from an action challenging a decision to abolish the position of assistant building inspector. The court also held that plaintiff's claims were barred by the statute of limitations. Thus, the court's statements concerning legislative immunity, were dicta which were not necessary to resolution of the issues before the court. Likewise, the plaintiff's claims in the instant case against the county were ultimately decided on grounds other than legislative immunity -- specifically, that plaintiff failed to establish any custom or policy that may have caused the alleged constitutional violation.

Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985) and Personnel

Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1978) did not even address the issue of legislative immunity. It is inapposite to suggest that there is some conflict between the Fourth Circuit and other circuits or between the Fourth Circuit and the Supreme Court when the cases relied upon did not even address the issue planitiff wants to present. In any event, the statements of Judge Hall concerning legislative immunity are consistent with pronouncements of the Supreme Court.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,

William A. Blancato
Attorney for Respondents

APPENDIX

Section 153A-76. Board of commissioners to organize county government.

The board of commissioners may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the county government, may impose ex officio the duties of more than one office on a single officer, may change the composition and manner of selction of boards, commissions, and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs, subject to the following limitations:

(1) The board may not abolish an office, position, department, board, commission, or agency established or required by law.

(2) The board may not combine offices or confer certain duties on the same office when this action is specifically forbidden by law.

(3) The board may not discontinue or assign elsewhere a function or duty assigned by law to a particular office, position, department, board, commission, or agency.

(4) The baord may not change the composition or manner of selection of a local board of education, the board of health, the board of social services, the board of elections, or the board of alcoholic beverage

Supreme Court, U.S.
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No. 92-656

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v.

GENE E. RAINEY, CHAIRMAN OF THE BUNCOMBE COUNTY COMMISSIONERS, IN HIS OFFICIAL AND IN HIS PERSONAL CAPACITIES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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ARGUMENT

The Respondent' Brief in Opposition to Petition seeks to shift the focus of this case from the application of the doctrine of legislative immunity to Judge Luttig's suggestion that plaintiff failed to advance sufficient evidence in opposition to the summary judgment motion by raising that as their first reason for denying writ. However, neither Respondents' brief nor Judge Luttig's opinion set forth the essential procedural background which undermines the validity of such a position. First, the motion for summary judgment was filed by defendants prior to the conclusion of the pleadings in the case. No discovery had been undertaken by any of the parties at the time of its filing. The motion by its very terms was "on the grounds that plaintiff's action is

barred by legislative immunity." Defendant Thornberry also sought summary judgment "on the grounds that he is entitled to qualified immunity". Joint Appendix p. 46.

Contemporaneously with the filing of their motion for summary judgment, the defendants filed a motion to stay discovery "until the issues raised by defendants' motion for summary judgment on the grounds that plaintiff's action is barred by legislative immunity and qualified immunity are resolved." In ruling on the defendants' motion to stay discovery, the magistrate ordered that "discovery shall be stayed from the date of entry of this Order until such time as a recommendation is entered on the Motion for Summary Judgment, except that discovery shall remain open on matters

concerning the Motion for Summary Judgment". (Neither the motion for stay nor the magistrate's order, both quoted from above, were included in the Joint Appendix because they were not relevant to the appeal.) The discovery undertaken was thus limited to whether the action was barred by legislative immunity (a legal issue) and whether Thornberry was entitled to qualified immunity. Consequently, the defendants who were county commissioners were not deposed. Only defendants Thornberry and Kirstein were deposed. In fact during these depositions the defendants' attorney instructed them not to answer questions propounded concerning the executive session in which the commission discussed plaintiff's position. See, for example, Joint Appendix, p. 358. The magistrate's memorandum and

recommendation which was adopted by the district court and ultimately by Judge Hall was not grounded on any lack of evidence. In fact, it said that "(t)o the extent the submitted affidavits go to the motives behind the board action, they have not been considered because issues of motive are not reached unless procedural bars are overcome. Plaintiff cannot overcome the absolute bar of legislative immunity. While courts traditionally abhor procedural default, the doctrine of legislative immunity is firmly rooted in the development of this country's jurisprudence." [Footnote deleted] Joint Appendix, p. 533. Therefore, the appeal to the Fourth Circuit was based on this proposition of law; and the issue of whether there was sufficient evidence adduced was not raised until it appeared

in Judge Luttig's opinion. Moreover, as stated in Judge Butzner's dissenting opinion "a genuine issue of material fact exists concerning her claim of a constitutional tort and the County's claim that efficiency and economy dictated the elimination of the two positions." Petition, p. 27a. In light of this, it is unseemly for the Respondents to argue in their brief that:

> It is important at the outset to note, however, that the decision of the Fourth Circuit did not turn on the issues raised by plaintiff in her Petition. Instead, the Fourth Circuit's decision was based on the particular facts of this case and on Judge Luttig's conclusion that plaintiff failed to meet her evidentiary burden under Fed. R. Civ. P. 56.

Respondents' Brief, p. 8.

This simply was not the case.

Finally, the Petitioner invites this Court's attention to the cases of

Presley. v. Etowah County Commission and Mack v. Russell County Commission, Nos. 90-711 and 90-712, 1992 WL 9046(U.S.) decided by this Court on January 27, 1992. In those cases two boards of county commissioners in Alabama made changes in the powers of individual county commissioners over road operations in their respective districts in an alleged attempt to dilute the power of newly elected black county commissioners. This Court noting that the Voting Rights Act under which the actions were brought does not apply to all forms of "pernicious discrimination" affirmed the dismissal of the lawsuits. However, in dicta, this Court noted that: "Nothing we say implies that the conduct at issue in these cases is not actionable under a different remedial scheme." (Page 11) Clearly, what

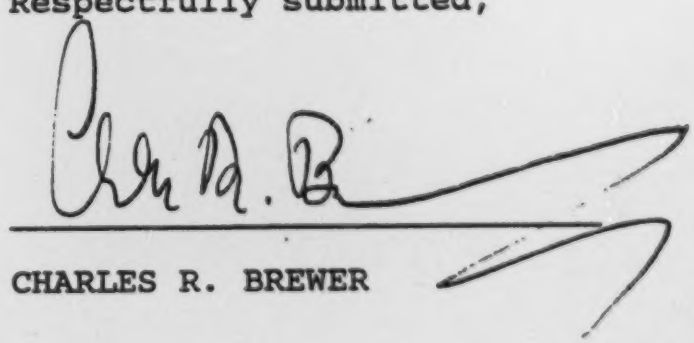
was at issue in those cases was the legality of local "legislative" acts that allegedly violated the Constitutional rights of the newly elected black commissioners. The Alabama legislature had passed enabling legislation to permit the counties to make such changes. Similarly, the North Carolina legislature has authorized boards of commissioners to abolish positions. Brief in Opposition, p. 1a. However, it is respectfully contended that in neither case may the commissioners exercise the authority given to them under state law with an unconstitutional motivation. As quoted above this Court said that under the correct remedial scheme that the cases would be actionable. This strongly suggests that the doctrine of legislative immunity will not bar actions based on

local "legislative" acts that violate an individual's constitutional rights. Certainly the issue would be in any such action whether or not the "legislative" actions in question were motivated by a desire to deprive individuals of their constitutional rights. In the Alabama cases, the issue would be whether the motive was an unconstitutional race based discrimination against black county commissioners in violation of the Fourteenth Amendment. In the case presented by this petition the issue is whether the motive was an unconstitutional political based discrimination against a public employee in violation of the First Amendment.

CONCLUSION

For the reasons set forth above along with the reasons contained in the Petition and those contained in the Brief of the Southern States Police Benevolent Association as Amicus Curiae in Support of Petitioner, Petitioner renews her request that the Court grant her petition for writ of certiorari, and reverse the judgment below.

Respectfully submitted,



CHARLES R. BREWER

November 21, 1992